No. 86-677

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

SEARS, ROEBUCK AND CO., PETITIONER

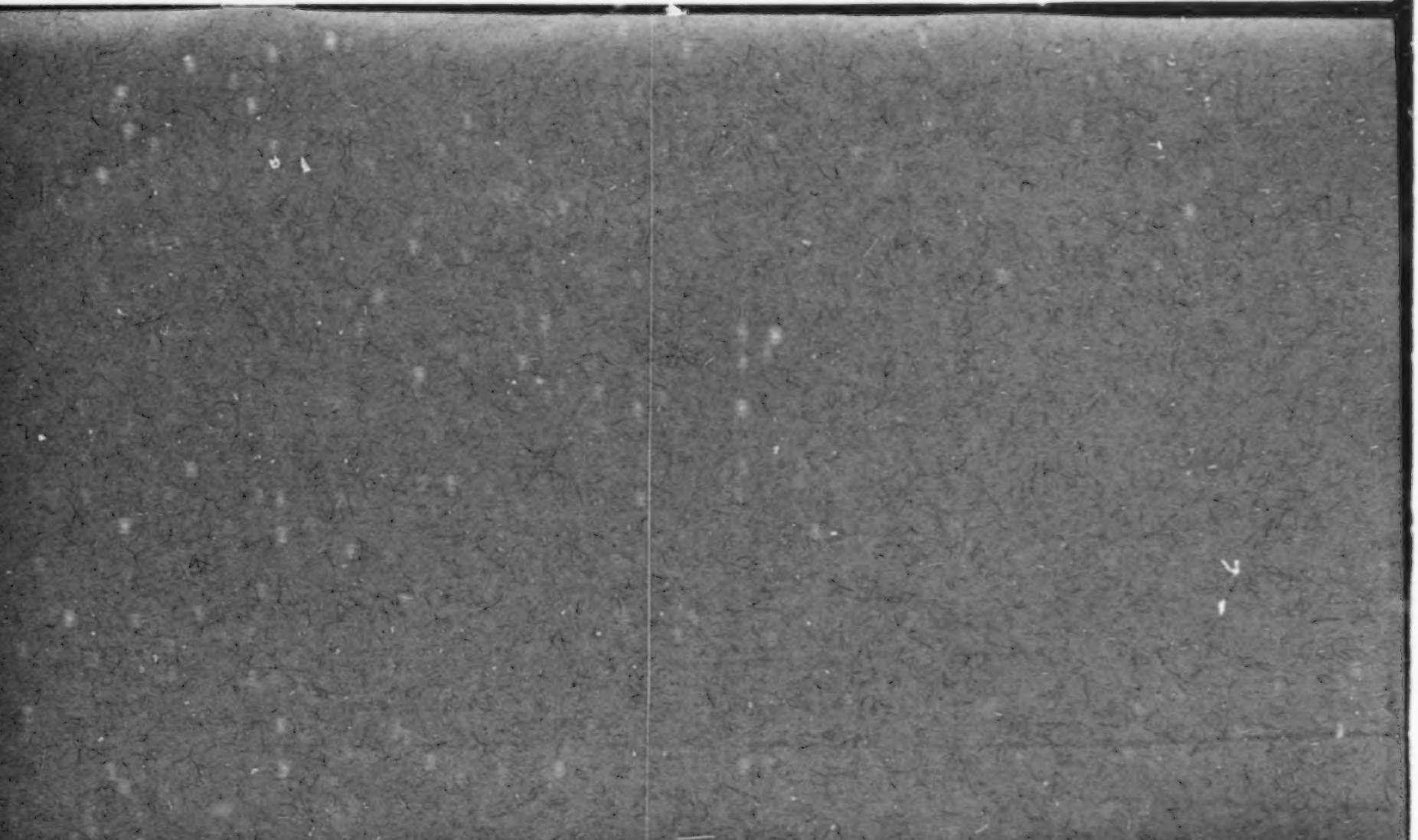
v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment on statute of limitations grounds.

On February 26, 1980, petitioner was indicted in the United States District Court for the Central District of California. The indictment charged petitioner with 12 counts of importing televisions into the United States by making false statements in Customs Service documents, in violation of 18 U.S.C. 542, and conspiring to do so, in violation of 18 U.S.C. 371 (Pet. App. D1-D10). On January 17, 1984, the grand jury returned a superseding indictment charging petitioner with violating the general federal false statement statute, 18 U.S.C. 1001, by making the same 12 false statements in Customs Service documents, and conspiring to do so (Pet. App. E1-E10).

On October 3, 1984, the district court dismissed the superseding indictment on the ground that it was barred by the statute of limitations (Pet. App. B1-B2). The court of appeals reversed (Pet. App. A1-A8). It held that the original indictment tolled the statute of limitations as to the charges that it set forth, making the superseding indictment timely unless it broadened or substantially amended the charges in the original indictment (*id.* at A2). The court ruled that the substitution of the general false statement provision in 18 U.S.C. 1001 for the more specific false statement provision in 18 U.S.C. 542 did not expand or broaden the charges, since both statutes have the same elements. It also found that the potential for a greater penalty under 18 U.S.C. 1001, a fine of $10,000 instead of a fine of $5,000 on each substantive count, did not make the charges in the superseding indictment broader than those in the original indictment (Pet. App. A3).

Petitioner contends (Pet. 10-19) that the superseding indictment is barred by the statute of limitations because it exposes petitioner to "significantly higher penalties" and "significantly expanded the avenues of proof available" to obtain a conviction. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position it would have occupied if the district court had denied its motion to dismiss. If petitioner is acquitted following a trial on the merits, its contentions will be moot. If, on the other hand, petitioner is convicted and its conviction is affirmed on appeal, it will then be able to present its contentions to this Court, together with any other claims it may have, in a petition for a writ of certiorari seeking review of a final judgment against it. Accordingly,

review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[2]

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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[1]It is now more than 33 months since the return of the superseding indictment, more than 80 months since the return of the original indictment, and more than 25 months since the district court's dismissal order. Further interlocutory review at this time would cause additional delay in the final resolution of the charges against petitioner.

[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.